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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 968

STATE OF NEW YORK, *Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

Appeal From the United States District Court for the Western District of New York

MOTION TO AFFIRM

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Appellees,[1] intervening defendants below, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States move that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so insubstantial as not to warrant further argument.

[1] Bay State Milling Company, Inc., Commonwealth of Pennsylvania, Port Authority of Allegheny County, Regional Industrial Development Corporation of Southwestern Pennsylvania, The Baltimore & Ohio Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company and all other railroads named as intervening defendants in the proceeding before the District Court.

STATEMENT

This case arose out of the following situation: The railroads serving Pittsburgh published reduced rates on grain and grain products from Pittsburgh to eastern destinations. The Interstate Commerce Commission concluded that the involved rates were compensatory, provided the railroads a net revenue benefit, and were otherwise just and reasonable. The court below dismissed the complaint seeking to set aside the order of the Commission. *State of New York* v. *United States,* 256 F. Supp. 634 (W.D.N.Y. 1966).

ARGUMENT

The decision of the District Court is plainly correct. The State of New York enumerates three questions said to be presented. Essentially they are but a single question: Did the court below give adequate consideration to the evidentiary support for the conclusion of the Commission that the rates in question would produce a net revenue benefit for the railroads? Far from ignoring the question, the opinion of the court considered appellant's contentions, reviewed the evidence before the Commission, and concluded that there was no warrant for disturbing the "judgment of the . . . tribunal appointed by law and informed by experience."

Bay State Milling Company had concluded that it must locate mills nearer its eastern markets and its choice had narrowed to Pittsburgh or Buffalo. No wheat is now milled at Pittsburgh. Bakery flour is milled at Buffalo, largely from water-delivered grain, or at Kansas and Minnesota mills. The railroads involved now participate in the transportation of the

Kansas-Minnesota flour from such interchange gateways as Chicago and St. Louis to the East. Thus, to the extent that the production of a new mill at Pittsburgh would displace present flour movements by rail, it would be movements from existing midwestern mills or from Buffalo. Appellant argued that the railroads would derive more net revenue if they continued to haul midwestern flour from the interchange gateways east or even from Buffalo, despite its lower rates, and that thus the new Pittsburgh traffic would result in a net revenue loss.[2]

The District Court considered these very contentions and reviewed the related evidence before the Commission with care and perception:

> "One need hardly go beyond the initial illogic of arguing that the railroads will fare better under the depressed ex-lake rates from Buffalo than with the higher rates proposed from Pittsburgh al-

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[2] Appellees are not prepared to concede that the "net revenue" criteria is a *sine qua non* for finding a rate to be just and reasonable. Nor, in fact, did the Court so hold. On the contrary, the Court stated:

> "But we have the gravest doubt whether, in empowering the Commission to proscribe a rate as unduly low, Congress meant to *require* it to examine the wisdom of the proponents of rates yielding more than out-of-pocket costs when there is no threat of injury to competing carriers or consequently of retaliatory action by them, the traffic will not move at higher rates, and the sole substantial claim is that because of effects on other traffic the proponents would be better off if the new movement did not occur." 256 F. Supp. 637-38 (emphasis in original).

Indeed, the Court stated that the Commission would be warranted in deferring to managerial judgment without further inquiry, citing *Pig Iron from New York Points to Detroit*, 296 I.C.C. 747, 752 (1955). *Id.*

though, for most destinations, the latter yield considerably higher ratios to out-of-pocket cost. (See 322 I.C.C. at 237, 242 Apps. B and D). Since most of the grain milled at Buffalo arrives there by water, all the dire effects predicted from the Pittsburgh rates would thus occur in even greater measure if the Buffalo mills succeeded in displacing an equivalent amount of mid-western flour. Still more adverse consequences would ensue for the railroads if failure to develop a milling industry at Pittsburgh should result in the growth of mills in the large seaport markets to which grain can move by all-water routes. Finally, the new Pittsburgh rates to many destinations show a more favorable ratio to out-of-pocket costs than the proportional rates on which flour moves from Chicago and St. Louis, although, of course, for a shorter haul." 256 F. Supp. 638.

To appraise appellants' arguments as an exercise in illogic is hardly to ignore them, as appellant contends:

> *"Nowhere in the court's opinion is there any examination of whether or not the Commission's finding that the carriers would be better off with the proposed rates than without them was, in fact, based upon substantial evidence."* Jurisdictional Statement, p. 11 (Emphasis in original).

The District Court obviously came to grips with the substantial evidence issue as the preceding quotation from the court's opinion shows. Having found that there was substantial evidentiary support for the Commission's conclusion, the court thus disposed of appellant's claimed countervailing evidence:

> "In sum the Commission had substantial basis for finding the claim of adverse effect on net revenues

> to be too speculative to warrant disapproval of rates necessary for the movement of traffic, exceeding out-of-pocket costs, and having no harmful effect on any competing carrier." 256 F. Supp. 638.

The District Court's reviewing responsibility was then at an end.

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286-87.

The court below had no further duty to weigh every competing inference that the ingenuity of appellant's counsel could suggest. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474.

Finally, appellant argues that the proponent carriers failed to meet their burden of proof and the court below erred in finding otherwise. Once again, appellant's claim is based on the premise that there will be no net revenue benefit flowing from the reduced rates and that this was the only conclusion possible on the basis of the record. This ignores the fact that the court below came to precisely the opposite conclusion and found that there was substantial basis for the Commission to determine that a net revenue advantage would result.

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of

this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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Certificate of Service

I certify that I have served the foregoing motion to affirm under paragraph 1 of Revised Rule 33 of this Court by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to Louis J. Lefkowitz, Ruth Kessler Toch and Dunton F. Tynan, The Capitol, Albany, New York 12224; Matthew A. Tiffany, 65 Court Street, Buffalo, New York 14202, and Walter J. Myskowski, 721 Ring Building, 1200 18th Street, N. W., Washington, D. C. 20036, counsel for the State of New York, appellant herein. I also certify that I have served the foregoing motion to affirm under paragraph 2 of Revised Rule 33 by depositing copies of the same in a United States mailbox with first class postage prepaid, addressed to Thurgood Marshall, Solicitor General, Department of Justice, Washington 25, D. C. and Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.

EUGENE T. LIIPFERT